

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK R. SIDDALL,

Defendant-Appellant.

UNPUBLISHED

August 11, 2000

No. 217971

Wayne Circuit Court

LC No. 97-502102

Before: Murphy, P.J., and Kelly and Talbot, JJ.

MEMORANDUM.

Defendant pleaded guilty of embezzlement over \$100, MCL 750.174; MSA 28.371, for which he was sentenced to serve three years' probation and ordered to pay restitution of \$68,949. He appeals by leave granted, and we remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts that his due process rights were violated when the trial court denied his request for an evidentiary hearing regarding the amount of restitution to be paid to the victim. We agree. Upon a proper and timely request, a defendant is entitled to an evidentiary hearing to determine the amount of restitution due the victims of his crime. MCL 780.767; MSA 28.1287(767); MCL 769.1a; MSA 28.1073; *People v Gahan*, 456 Mich 264, 276 n 17; 571 NW2d 503 (1997); *People v Grant*, 455 Mich 221, 243; 565 NW2d 389 (1996). At such a hearing, the prosecutor bears the burden of establishing by a preponderance of the evidence the amount of loss sustained by a victim as a result of the defendant's offense. MCL 780.767(4); MSA 28.1287(767)(4); *People v Law*, 459 Mich 419, 431-432; 591 NW2d 20 (1999).

At sentencing in this case, defense counsel informed the court that defendant disputed the amount of restitution claimed by the victim, that an insurance company investigation was then pending, and that defendant demanded an evidentiary hearing on the issue. Despite this, the court sentenced defendant to serve three years' probation and took the matter of the amount of restitution under advisement, indicating that the parties were encouraged to submit documentation for the court's consideration and that a decision would be rendered in thirty to sixty days. At the close of the sentencing hearing, the court did not respond to defense counsel's specific request for a restitution

hearing. Defendant alleges that the court conducted an ex parte informal hearing on the matter without notifying him or his counsel. On March 9, 1998, the court entered an amended order of probation setting the amount of restitution at \$68,949. The trial court denied defendant's motion for rehearing of the order, apparently ruling that it was a "civil" matter.

Under the circumstances, we find that defendant's statutory and constitutional right to an evidentiary hearing was violated. We, therefore, remand this matter to the trial court, which shall conduct a hearing in accordance with due process and the restitution statutes in effect at the time relevant.¹

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Michael J. Talbot

¹ The restitution statute has been the subject of various amendments since its enactment in 1985. See historical notes following MCL 769.1a; MSA 28.1073, and MCL 780.766; MSA 28.1287(766). See *Grant, supra*, 455 Mich 241, n 26; *People v Collins*, 239 Mich App 125, 134; 607 NW2d 760 (1999).